IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 244 OF 2004

Mohd. Yusuf Wald Abdul Aziz & ors. ... Appellants

V/s

Amin Fakir Mohammed ... Respondent

Mr. M. R. Deshpande for the appellants.

Mr. R.A. Karule for the respondent.

CORAM: P.V. KAKADE, J.

DATED: 15TH SEPT., 2005

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by the Addl. District Judge, Malegaon, dated 20.10.2003 dismissing the appeal and confirming the judgment and order passed by the Civil Judge, Sr. Divn., Malegaon, dated 29.6.1998 dismissing the plaintiffs' suit for injunction, declaration as well as for specific relief against the defendant No.1.

2. I have heard the learned counsel for both parties. Perused the record.

3. The plaintiffs filed the suit for prohibitory injunction for restraining defendant No.2 from alienating the suit property to defendant No.1 or to any other person. Later on by way of amendment, relief seeking declaration about the sale deed executed by defendant No.2 in favour of defendant No.1 was added and it was claimed by the plaintiffs that defendant No.2 was mentally ill person and was not in a position to execute the document and was not able to understand the consequences of his act and, therefore, the sale deed came to be executed by unsound mind person and defendant No.1 taken undue advantage of mental condition of the defendant No.2. Hence, the suit came to be filed.

Defendants contested the suit inter-alia denying the allegations made by the plaintiffs. It was submitted that defendant No.2 was not mentally ill person and it was further asserted by the defendant No.1 that defendant No.2 has consciously executed the sale deed in his favour by accepting the consideration. Parties to the suit are Muslims. So defendant No.2 being the owner of the property was able to dispose it of as per his wish within his life time. Plaintiffs who are his legal heirs have no authority to challenge the act of defendant No.2 and, therefore, the suit was sought to be

dismissed with costs.

4. The learned Trial Judge, after hearing both parties and on the basis of available evidence came to the conclusion that the plaintiffs had failed to prove their allegations and, therefore, they are not entitled to any reliefs claimed and the suit came to be dismissed.

The appeal was carried to the District Court, Malegaon. The learned Ad-hoc Assistant District Judge, after hearing both sides, upheld the findings recorded by the Trial Court dismissed the appeal. Hence the present appeal is filed.

5. On perusal of the record, it is clear that there is no substantial question of law involved in this appeal. The learned counsel for the appellants urged that, in the course of pendency of the appeal in the lower appellate Court he had produced the medical certificate from Wadia Hospital, Malegaon showing that defendant No.2 was of unsound mind. The learned lower appellate Court, for the reasons recorded in clear terms, discarded the certificate from consideration. In this regard, it must be noted that the provision of Order 41 Rule 27 of C.P.C. was not adhered to by the appellants.

It is needless to mention that when the appellants were aware of the fact that the issue of mental illness of defendant No.2 was raised and was to be adjudicated at the trial stage, it was their duty to produce all the available documentary evidence in support of the fact that defendant No.2 was mentally ill. He did not do so and when the learned Trial Judge observed that there is no documentary evidence in support of the contention, then the appellants sought to fill up the lacuna by producing the said medical certificate but the learned lower appellate Court has rightly discarded the certificate from consideration on the ground that it was without foundation in pleadings and, therefore, no evidence in that regard to be led so as to conclude that the alleged document sought to be relied upon was sufficient to show that defendant No.2 was mentally ill. There is no other question of law involved in this appeal and both the Courts below are seen to have properly appreciated the factual aspects of the evidence in order to conclude that the plaintiffs' suit is devoid of any merits.

In the result, I am fully agree with the concurrent findings recorded by both the Courts below and in the result, the appeal stands dismissed with no order as to

costs.

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